

# COMMENTS

## APPENDED POST-PASSAGE SENATE JUDICIARY COMMITTEE REPORT: UNLIKELY “LEGISLATIVE HISTORY” FOR INTERPRETING SECTION 5 OF THE REAUTHORIZED VOTING RIGHTS ACT

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## INTRODUCTION

As a sacred symbol of electoral equality and democracy, the Voting Rights Act (VRA)<sup>1</sup> has long been regarded as “the most effective civil rights statute” ever promulgated by Congress.<sup>2</sup> Section 5 of the VRA (“Section 5”) has been called the “crown jewel” of the Act,<sup>3</sup> uniquely targeting only certain jurisdictions—eight states and various other counties and townships<sup>4</sup>—with some of the country’s worst histories of voting discrimination, and requiring that these jurisdictions submit any election-related changes for approval by the federal government.<sup>5</sup>

<sup>1</sup> Voting Rights Act (VRA) of 1965, Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C. §§ 1971, 1973–1973bb).

<sup>2</sup> Richard H. Pildes, *Introduction to THE FUTURE OF THE VOTING RIGHTS ACT*, at xi, xi (David L. Epstein et al. eds., 2006).

<sup>3</sup> Guy-Uriel E. Charles & Louis Fuentes-Rohwer, *Rethinking Section 5, in THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 2, at 38, 38.

<sup>4</sup> States covered in whole are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas; Virginia, with the exception of fourteen political subdivisions, is also covered. Townships in Michigan and New Hampshire, as well as counties in California, Florida, New York, North Carolina and South Dakota are also covered. U.S. Dep’t of Justice, Civil Rights Div., Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm#note1](http://www.usdoj.gov/crt/voting/sec_5/covered.htm#note1) (last visited Oct. 23, 2007).

<sup>5</sup> Before Section 5 was reauthorized, it required that covered jurisdictions submit “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964” to either the Attorney General for preclearance approval, or to the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a) (2000), *amended by Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA)* of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (to be codified as amended at 42 U.S.C. §§ 1973–1973bb-1). The proposed voting change must not have had “the purpose [or] . . . effect of denying or abridging the right to vote on account of race or color, . . . [and] no person shall be denied the right to vote for failure to comply” with the proposed change.

In *Georgia v. Ashcroft*,<sup>6</sup> however, the Supreme Court adopted a more deferential approach that may well have robbed Section 5 of its enforcement power regarding legislative redistricting.<sup>7</sup> In response, many civil rights scholars and advocates urged Congress both to reauthorize and to strengthen the provision before it was due to expire in 2007.<sup>8</sup> Congress allayed such fears on July 13, 2006 by passing the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA).<sup>9</sup> Congress not only reauthorized Section 5 for another twenty-five years with the near-unanimous support of both houses,<sup>10</sup> but it also explicitly condemned *Georgia v. Ashcroft* for misconstruing Section 5.<sup>11</sup>

Nonetheless, civil rights advocates and proponents of Section 5 may still have reason to worry. After the VRARA bill passed and only one day before President Bush signed the bill into law, the Senate Judiciary Committee issued a report (the Senate Judiciary Committee Report or Senate Report)<sup>12</sup> on the virtually identical Senate version of the bill.<sup>13</sup> The Senate Report interpreted the language of the reauthorized Section 5 narrowly, while two individual Republican senators argued that the legislative process was too time-pressured and politically charged to enable

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<sup>6</sup> 539 U.S. 461 (2003).

<sup>7</sup> See *infra* notes 40-42 and accompanying text (criticizing *Ashcroft*'s retrogression standard for weakening Section 5's enforcement powers with respect to redistricting); see also Bernard Grofman & Thomas Brunell, *Extending Section 5 of the Voting Rights Act: The Complex Interaction Between Law and Politics*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 2, at 311, 315 (condemning *Ashcroft* for robbing Section 5 of its central justification and enforcement powers).

<sup>8</sup> See, e.g., LAUGHLIN McDONALD & DANIEL LEVITAS, ACLU VOTING RIGHTS PROJECT, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), available at [http://www.aclu.org/votingrights/2005\\_report.pdf](http://www.aclu.org/votingrights/2005_report.pdf) (urging Congress to renew and strengthen Section 5 based on detailed descriptions of post-1982 Section 5 litigation).

<sup>9</sup> Pub L. No. 109-246, 120 Stat. 577.

<sup>10</sup> See *infra* notes 43-44 and accompanying text (describing the bill's passage by the entire Senate and all but thirty-three members of the House).

<sup>11</sup> See Pub L. No. 109-246, § 2(b)(6) ("The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by Section 5 of such Act.")

<sup>12</sup> S. REP. NO. 109-295, at 1 (2006) (Conf. Rep.).

<sup>13</sup> Fannie Lou Hamer, Rosa Parks, Coretta Scott King, and César E. Chávez Voting Rights Act Reauthorization and Amendments Act of 2006, S. 2703, 109th Cong. (2d Sess. 2006). The only difference between the bills is that the Senate version included César E. Chávez's name in its title.

Congress to craft an adequate Section 5.<sup>14</sup> The Senate Report cannot be said to represent the views of the entire committee, however. Not only did one Republican Senate Judiciary Committee member refuse to sign the Report,<sup>15</sup> but the Democratic members of the Judiciary Committee never received a version of the final Report containing the narrow interpretation of Section 5 retrogression before the Report was filed.<sup>16</sup> Ultimately, the published Senate Report included a fervent dissent to an earlier version of the Report. This dissent, signed by all eight Democratic Senators on the Senate Judiciary Committee, denounced the Senate Report as inaccurate, postenactment legislative history not deserving of judicial consideration.<sup>17</sup>

Still, given that there is considerable debate among scholars as to which retrogression standard<sup>18</sup> the reauthorized Section 5 established, and that the text of the legislation, the floor debates, and the House Committee Report<sup>19</sup> fail to provide any further guidance or alternate understanding, this appended Committee Report may become pivotal in cases challenging the reauthorized Section 5's constitutionality.<sup>20</sup> If the Court adopts the Senate Report's narrow interpretation, Section 5's preclearance enforcement provision<sup>21</sup> is more likely to be held unconstitutional, which is exactly the result that civil rights advocates and many supporters of the bill aimed to avoid.<sup>22</sup>

<sup>14</sup> See *infra* Part I.D (describing the Senate Judiciary Committee report).

<sup>15</sup> See Seth Stern, *Senate Democrats Suggest Republicans Tried To Undercut Voting Rights Act*, CQ TODAY, July 27, 2006, available at 2006 WLNR 13284338 (noting Senator DeWine's refusal to sign the Senate Judiciary Committee report).

<sup>16</sup> See 152 CONG. REC. S8372-73 (daily ed. July 27, 2006) (statement of Sen. Leahy) (accusing the Republican Senate Judiciary Committee members of failing to provide Democratic members with copies of the Senate Report before filing it).

<sup>17</sup> S. REP. NO. 109-295, at 54-55.

<sup>18</sup> In this piece, "retrogression standard" refers to the degree to which Section 5 dilutes the impact of minorities' votes.

<sup>19</sup> H.R. REP. NO. 109-478 (2006) (Conf. Rep.).

<sup>20</sup> See, e.g., Complaint at 1-8, *Nw. Austin Mun. Util. Dist. No. One v. Gonzales*, No. 06-01384 (D.D.C. Aug. 4, 2006), available at <http://electionlawblog.org/archives/northwest%20austin.pdf>. Other documents relating to the case are available on the Public Citizen's website. See Public Citizen, <http://www.citizen.org/litigation/forms/cases/CaseDetails.cfm?cID=361> (last visited Nov. 30, 2007).

<sup>21</sup> In this piece, the "preclearance enforcement provision" means that a covered jurisdiction's proposed voting-related change will only be permitted if it meets Section 5's retrogression standard.

<sup>22</sup> See Letter from the Leadership Conference on Civil Rights to Hon. F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary (May 3, 2006), available at <http://www.votingrights.org/advocacy/downloads/LCCR%20VRA%20Sign%20On%20Letter.pdf> (urging Congress to reauthorize section 5 and restore it to "its original Congressional intent," and to keep "the federal observer provisions in place").

This Comment will examine whether the Senate Judiciary Committee Report should be considered legislative history relevant to interpreting Section 5's scope and evaluating the provision's constitutionality. Part I will provide a historical and legislative background of Section 5 of the VRA before and after its reauthorization in 2006, and will describe in detail the appended Senate Judiciary Committee's Report. Part II will then examine which retrogression standard the reauthorized Section 5 established in the absence of the Senate Report, as compared with the narrow standard articulated by the Report. Such an analysis highlights how critical the Senate Report, if considered authoritative legislative history, could be in determining the scope and enforcement power of Section 5. Part III will consider which type of legislative history, if any, the Senate Report should constitute, and, thus, what level of deference it is owed by the judiciary. After all, each type of legislative history the Report might constitute, be it a committee report or postenactment legislative history, would entitle the report to a different level of authoritativeness. Because the Senate Report does not concretely fall into either of these categories, Part IV will then evaluate whether the Report represents Congress's collective understanding of Section 5, employing three models that consider, respectively, whether the bill's sponsor, the median voter, or the bill's explicit language best represents congressional intent. Under each of these models, the Report fails to represent congressional intent accurately, leading to the conclusion that the Senate Judiciary Committee Report should not factor into judicial decision making. Instead, the Report raises the same bootstrapping concern as postenactment legislation, which the Court has repeatedly refused to consider as relevant legislative history.

I. BACKGROUND ON SECTION 5'S EVOLUTION: SECTION 5 BOTH  
BEFORE AND AFTER THE 2006 REAUTHORIZATION, AND  
THE SENATE JUDICIARY COMMITTEE REPORT

A. *Section 5 and the Beer Retrogression Standard*

By requiring each covered jurisdiction to have its election laws "precleared" by federal officials or judges, Section 5 of the VRA empowers the federal government to prevent covered jurisdictions from enacting discriminatory voting standards, procedures, and practices. Although the original VRA already designated when a jurisdiction should be entitled to preclearance,<sup>23</sup> the Supreme Court in *Beer v. United States*<sup>24</sup> narrowed Sec-

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<sup>23</sup> See *supra* note 5 (explaining the original VRA's preclearance standard).

<sup>24</sup> 425 U.S. 130 (1976).

tion 5's enforcement powers by establishing what has come to be known as a "non-retrogression" standard, which prevents covered jurisdictions from weakening minorities' existing electoral position and voting power.<sup>25</sup> *Beer* established that Section 5 preclearance relies solely on the discriminatory effects of voting-related changes, ignoring intent. To evaluate effects on minority voting strength, courts engaging in *Beer* Section 5 analysis have generally compared the number of majority-minority districts—districts in which a single minority group makes up more than fifty percent of the voting age population—before and after the proposed voting or districting change.<sup>26</sup>

However, this method may not be the best way of advancing the VRA's underlying purpose and evaluating minority voting strength. In fact, there is significant debate among election law scholars as to whether minorities' electoral interests are best served by majority-minority districts. Proponents of majority-minority districts argue that, both empirically and from a policy standpoint, these districts constitute a better safeguard against minority vote dilution than "influence" or "coalition" districts.<sup>27</sup> Influence districts are defined by the Supreme Court as ones in which minority voters, who constitute as little as twenty-five percent of the overall population, "may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."<sup>28</sup> Meanwhile, the *Ashcroft* Court defined "coalition" districts as "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a

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<sup>25</sup> *Id.* at 141.

<sup>26</sup> See *infra* notes 68-70 and accompanying text (explaining that the Supreme Court's Section 5 retrogression cases generally involved majority-minority districts).

<sup>27</sup> See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1404-05 (2001) (offering empirical evidence that black voters benefit more from majority-minority districts than minority influence districts); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 35 (2004) (arguing that majority-minority districts are a better safeguard against minority vote dilution than influence districts).

<sup>28</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). In practice, minorities in such a district should constitute a significant enough share of the district that they will not be ignored by the eventually elected representative, whether or not the minorities themselves voted for that candidate. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. (forthcoming 2007) (manuscript at 159, on file with author). However, both the House and Senate Reports criticized the "influence district" standard as amorphous and unworkable. See H.R. REP. NO. 109-478, at 69 (2006) (Conf. Rep.) (criticizing this standard for allowing state legislators to strike political deals "purporting to give 'influence' to the minority community while removing that community's ability to elect candidates"); S. REP. NO. 109-295, at 18 (2006) (Conf. Rep.) (finding the "influence" district concept to be "vague").

single district in order to elect candidates of their choice."<sup>29</sup> In contrast, other scholars argue that "packing" minorities into a few districts actually dilutes minorities' electoral influence, while dispersing minorities into "influence" or "coalition" districts increases their ability to elect their candidates of choice due to coalitions they build with white voters.<sup>30</sup>

#### B. *Pre-Reauthorization: Adoption of the Deferential Ashcroft Standard*

Confronting doubts as to the viability of using majority-minority districts to measure minority voting strength, in 2003 the Supreme Court modified the *Beer* retrogression standard in *Georgia v. Ashcroft*.<sup>31</sup> Supported by many prominent African-American Democratic legislators and admittedly aimed at increasing the number of Democratic Senate seats, the redistricting plan involved in *Ashcroft*, which the Georgia State Senate had adopted after the 2000 census, dispersed minorities from majority-minority districts into a greater number of districts where they constituted as little as a quarter of the district population.<sup>32</sup> Opposing Georgia's request for a declaratory judgment that this plan would not violate Section 5, the Attorney General argued that because the plan unlawfully reduced minorities' ability to elect their candidates of choice, it should not be precleared.<sup>33</sup> Although Justice Sandra Day O'Connor, writing for the majority, conceded that minority voters under the redistricting plan "will face a somewhat reduced opportunity to elect their candidate of choice,"<sup>34</sup> she upheld the redistricting scheme under a broad "totality of the circumstances" test as "likely" meeting the state's non-retrogression

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<sup>29</sup> 539 U.S. at 481 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). More specifically, a "coalition" district is one in which "minorities constitute under 50% of the district, but with likely white crossover voting, they will be able to elect their preferred candidate." Persily, *supra* note 28 (manuscript at 160). As with "influence" districts, the Senate Report disapproves of "coalition" districts as being "too difficult to define." S. REP. NO. 109-295, at 18.

<sup>30</sup> See, e.g., CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 210-11 (1993) (preferring minority influence districts for enabling minority politicians to garner more support through interracial coalitions); Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996) (arguing that minority influence districts better position minority politicians for political success); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539-40 (2002) (arguing that especially because voting is decreasingly racially polarized, coalition districts enhance minority electoral success).

<sup>31</sup> 539 U.S. at 480.

<sup>32</sup> *Id.* at 469-71.

<sup>33</sup> *Id.* at 472.

<sup>34</sup> *Id.* at 489-90.

burden.<sup>35</sup> Reasoning that voting scholars themselves cannot agree on whether minorities can still effectively exert their electoral strength in so-called influence districts, the Court in *Ashcroft* granted local officials significant discretion in deciding whether to concentrate minorities in a smaller number of majority-minority districts or to reapportion them into a greater number of “influence” districts.<sup>36</sup> Moreover, since minority political influence is not limited to winning elections, *Ashcroft* argued that “influence districts” can still enable minority groups who do not constitute a majority of voters in a given district to affect the political process.<sup>37</sup>

Not surprisingly, the same scholars favoring minority influence and coalition districts over majority-minority districts heralded *Ashcroft* for permitting “democratic experimentalism.”<sup>38</sup> Under this approach, *Ashcroft* appears to offer an appropriately flexible standard that takes into account redistricting plans’ nuanced “trade-offs of political influence versus descriptive representation.”<sup>39</sup> However, other scholars vehemently criticized *Ashcroft* for undermining the VRA’s original intent of placing the burden on covered jurisdictions, rather than on the federal government or plaintiffs challenging the proposed changes, to prove that the voting changes do not retrogress to harm minority voters.<sup>40</sup> Seen in this light, *Ashcroft* considerably “defang[ed]” and rendered pointless Section 5’s redistricting enforcement powers.<sup>41</sup> Moreover, critics see the *Ashcroft* standard, in failing both to articulate what constitutes a legally sufficient “influence district” and to provide an algorithm for measuring retrogression, as being judicially unmanageable, thus “leav[ing] open the possibility that an amorphous standard will succumb to the partisan whims of those who will enforce it.”<sup>42</sup>

<sup>35</sup> *Id.* at 487.

<sup>36</sup> *Id.* at 487-90.

<sup>37</sup> *Id.* at 480.

<sup>38</sup> Richard H. Pildes, *Political Competition and the Modern VRA*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 2, at 1, 8.

<sup>39</sup> Samuel Issacharoff, *Does Section 5 of the Voting Rights Act Still Work?*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 2, at 107, 114.

<sup>40</sup> See, e.g., Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 2, at 223, 228 (arguing that the *Ashcroft* standard rendered preclearance procedures “pointless”); Karlan, *supra* note 27, at 21 (criticizing *Ashcroft* for “fundamentally alter[ing]” Section 5 preclearance).

<sup>41</sup> Persily, *supra* note 40, at 235.

<sup>42</sup> *Id.* at 128; see also *The Continuing Need for Section 5 Pre-Clearance: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 8 (2006) [hereinafter *Preclearance Senate Hearings*] (statement of Theodore S. Arrington, Professor of Political Science, University of North Carolina) (criticizing *Ashcroft* for misapprehending minority voter interests especially in light of continued racial bloc voting); *id.* at 6-8 (statement of Ronald Keith Gaddie, Pro-



C. 2006 Reauthorization: *Overtuning Ashcroft and Attempting To Return to Beer Retrogression*

On July 19, 2006, Congress reauthorized Section 5 for twenty-five more years with the support of a unanimous Senate<sup>43</sup> and all but thirty-three members of the House.<sup>44</sup> Many civil rights advocates declared the reauthorization process a resounding success, not only for preventing Section 5 from expiring in 2007, but also for explicitly overruling the Supreme Court's decision in *Ashcroft*.<sup>45</sup> Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, who led the passage of the initial bill, described Congress's process of reauthorizing the VRA as "one of the most extensive considerations of any piece of legislation" that he had seen in over twenty-seven years as a legislator.<sup>46</sup>

The House passed the reauthorization bill without amendment, ultimately rejecting all four proposed amendments.<sup>47</sup> Although the reauthorization bill met with little resistance from senators on the floor or through amendment, several experts testifying before the Senate Judiciary Committee criticized Section 5. These experts expressed concern that Section 5 of the VRA might not survive constitutional scrutiny under the Supreme Court's "congruent and proportional" standard<sup>48</sup> for legisla-

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fessor of Political Science, University of Oklahoma) (faulting both the pre-*Ashcroft* majority-minority standard and the *Ashcroft* standard for being unworkable).

<sup>43</sup> See 152 CONG. REC. S8012 (daily ed. July 20, 2006). Note that two senators did not vote. See *id.*

<sup>44</sup> See 152 CONG. REC. H5207 (daily ed. July 13, 2006). Note that nine representatives did not vote. See *id.*

<sup>45</sup> See Letter from the Leadership Conference on Civil Rights to Hon. F. James Sensenbrenner, *supra* note 22, at 2-4 (listing nearly one hundred civil rights organizations that support the Voting Rights Act).

<sup>46</sup> 152 CONG. REC. H5143 (statement of F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary).

<sup>47</sup> The House considered but defeated four different amendments: Representative Norwood's amendment to update the coverage formula based on voter turnout in recent presidential elections; Representative Gohmert's amendment to reduce the VRA's sunset period to ten years, rather than twenty-five; Representative King's amendment to repeal Section 203's multilingual assistance provisions; and Representative Westmoreland's amendment to change the bail out provision to proactively enable covered jurisdictions to bailout from coverage. See 152 CONG. REC. D771 (daily ed. July 13, 2006) (summarizing each amendment and its final roll call vote).

<sup>48</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Multiple statutes have been struck down under the *Boerne* standard. See, e.g., *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (striking down Title I of the Americans with Disabilities Act as applied to the states); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91-92 (2000) (striking down the Age Discrimination in Employment Act of 1967 as applied to the states); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-

tion passed pursuant to Section 5 of the Fourteenth Amendment.<sup>49</sup> In particular, they criticized VRA Section 5 as outdated for employing the same coverage formula as the original 1965 VRA, thereby ignoring subsequent improvements in covered jurisdictions.<sup>50</sup> Moreover, some experts were concerned that the bill's language was too ambiguous, falling short of defining what it means to "diminish[] the ability of [a minority group] . . . to elect their preferred candidates of choice",<sup>51</sup> and thus failing to articulate clearly how jurisdictions can establish sufficient non-retrogression warranting Section 5 preclearance.<sup>52</sup>

Despite these objections, the Senate unanimously passed the reauthorization bill without clarifying what either "ability to elect" or retrogression entails. Although scholars and Congress itself widely interpret the reauthorized Section 5 to constitute a return to the *Beer* retrogression

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48 (1999) (striking down the Patent Remedy Act as applied to the states); *Boerne*, 521 U.S. at 536 (striking down the Religious Freedom Restoration Act).

<sup>49</sup> See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 214-19 (2d Sess. 2006) [hereinafter *Reauthorization Hearing*] (statement of Richard L. Hasen, Professor, Loyola Law School) (explaining that the bill is vulnerable to several constitutional difficulties and offering suggestions to strengthen it); *id.* at 220-25 (statement of Samuel Issacharoff, Professor, New York University School of Law) (arguing that the bill could survive constitutional scrutiny if it employed a different enforcement mechanism); *Preclearance Senate Hearings*, *supra* note 42, at 198-207 (statement of Richard H. Pildes, Professor, New York University School of Law) (supporting the *Ashcroft* standard over that of the VRARA bill as the most appropriate standard to deal with contemporary voting rights problems).

<sup>50</sup> See *Reauthorization Hearing*, *supra* note 49, at 216 (statement of Richard L. Hasen, Professor, Loyola Law School) (explaining that Congress would be hard pressed to find the same type of voting rights violations today as those committed by covered jurisdictions when the VRA was first enacted); *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109th Cong. 7-9 (2d Sess. 2006) [hereinafter *Benefits and Costs Hearing*] (statement of Abigail Thernstrom, Senior Fellow, Manhattan Institute and Vice-Chair, U.S. Commission on Civil Rights) (criticizing the legislation as offensively stereotyping blacks while simultaneously employing an outdated coverage formula that ignores the progress that covered jurisdictions have made in recent years). Responding to such concerns, Representatives Norwood and Westmoreland introduced amendments later rejected by Congress that proposed to replace, respectively, Section 5's coverage formula and bailout provisions. See H.R. REP. NO. 109-554, at 3-4 (2006) (setting forth each of the amendments, which failed, respectively, by votes of 318 to 96 and 302 to 118, see 152 CONG. REC. H5204-07 (daily ed. July 13, 2006)).

<sup>51</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, Pub L. No. 109-246, § 5(b), 120 Stat. 577, 580-81 (2006), (amending 42 U.S.C. § 1973c (2000)).

<sup>52</sup> See, e.g., *Preclearance Senate Hearings*, *supra* note 42, at 11-12 (statement of Richard H. Pildes, Professor, New York University School of Law) (explaining that *Ashcroft* replaced *Beer* with a more flexible retrogression standard that is more appropriate to modern voting rights difficulties).

standard,<sup>53</sup> there is still considerable debate and confusion over what standard Section 5 established.<sup>54</sup> Because the Supreme Court often looks to legislative history that it considers relevant and authoritative in order to derive congressional intent where statutes are facially ambiguous,<sup>55</sup> the reauthorized Section 5's imprecise language may open the door for the Court to consider the Senate Judiciary Committee's controversial, after-the-fact report.

D. *Appended Post-Passage Senate Judiciary Committee Report:  
An Attempt To Narrow Section 5's Applicability*

On July 26, 2006, after Congress overwhelmingly passed the House version of the reauthorization bill and one day before President George W. Bush signed the bill into law, the Senate Judiciary Committee, led by Committee Chair and official Senate sponsor of the bill Senator Arlen Specter, issued a report on the virtually identical Senate version of the bill. The report introduced possibly significant legislative interpretations, which ultimately may affect Section 5's scope and strength.

In the section explaining Section 5's retrogression standard, the Senate Report defines the provision as protecting only "[n]aturally occurring majority-minority districts" that "have long been the historical focus of the Voting Rights Act."<sup>56</sup> Senator Jon Kyl then reiterated this interpretation of Section 5 in his separate "Additional Views."<sup>57</sup> Although this definition is somewhat ambiguous, it appears to narrowly construe minorities' "ability to elect." If the courts adopt this understanding of Section 5, they could significantly weaken the federal government's enforcement abilities.<sup>58</sup>

In a separate "Additional Views" section, Republican Senators John Cornyn and Tom Coburn argued that Congress failed to engage in "the kind of thorough debate that would have produced a superior product" because of an "unnecessarily heightened political environment" and the "expedited nature of the process."<sup>59</sup> They pointed to multiple areas of

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<sup>53</sup> See H.R. REP. NO. 109-478, at 94 (2006) (Conf. Rep.) (explaining that the VRARA "restores the standard articulated in *Beer*").

<sup>54</sup> For an in-depth interpretation of Section 5 that details the political pressures underlying the 2006 Reauthorization, see Persily, *supra* note 28.

<sup>55</sup> See *infra* note 105 (explaining which sources are generally considered relevant legislative history).

<sup>56</sup> S. REP. NO. 109-295, at 21 (2006) (Conf. Rep.).

<sup>57</sup> *Id.* at 22, 24.

<sup>58</sup> See *infra* Part II.A-B.

<sup>59</sup> S. REP. NO. 109-295, at 31.

Congress's factual record and testimony before the Senate suggesting that the reauthorized Section 5 is outdated, overly broad, and constitutionally suspect.<sup>60</sup>

Although courts interpreting ambiguously worded legislation generally accord significant weight to committee reports,<sup>61</sup> several distinguishing factors may decrease the weight that the Senate Report commands. First, only the Republican members of the Committee signed on to the Report. In fact, Senator Patrick J. Leahy, ranking minority leader of the Senate Judiciary Committee, criticized the Republican senators for filing the final Senate Report before providing any copies to the Democratic members of the Committee.<sup>62</sup> Nonetheless, the Report itself included the vehement objections of all eight Democratic Senate Judiciary Committee members<sup>63</sup> to a previous version of the bill that failed to include the narrowing "naturally occurring majority-minority district" language. In this section, the Democratic members concluded that the report cannot "diminish the force" of Congress's findings or the reauthorized Section 5.<sup>64</sup> These Democratic senators, as self-identified "sponsors of the Senate legislation," argued that the Report became "a very different document than the draft Report circulated by the Chairman," which "does not reflect [their] views or those of scores of other cosponsors," and departs from the "findings based on the extensive record created in both the House and Senate . . . found in the text of the legislation itself."<sup>65</sup> By denying that Section 5 applies only to "naturally occurring majority-minority districts," the Democratic members implied that the provision continues to concern and affect all covered jurisdictions. Such a partisan divide gives rise to two dueling understandings of Congress's intended definition of a minority group's "ability to elect," which in turn

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<sup>60</sup> See *id.* at 25-53.

<sup>61</sup> See *infra* notes 114-119 and accompanying text (explaining why committee reports are accorded more weight than other forms of legislative history).

<sup>62</sup> See 152 CONG. REC. S8372 (daily ed. July 27, 2006) (statement of Sen. Leahy) ("[N]o draft committee report . . . was circulated to the committee until July 24, 2006, [five] days after the Judiciary Committee unanimously voted to report it and the chairman had reported it, and four days after the Senate unanimously passed H.R. 9, the bill that President Bush signed into law this morning."); see also Stern, *supra* note 15 ("Democrats and advocacy group lawyers say Republicans might be trying to provide after-the-fact help to legal challenges against those provisions by including in the legislative history language that supports their position.").

<sup>63</sup> These members were Senators Patrick J. Leahy, Edward M. Kennedy, Joseph R. Biden, Jr., Herbert Kohl, Dianne Feinstein, Russell D. Feingold, Charles E. Schumer, and Richard J. Durbin. S. REP. NO. 109-295, at 55.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 54.

suggests that the writing of the Report was at least somewhat motivated by partisan tensions and objectives.

Moreover, not all the Republican members of the Senate Judiciary Committee signed on to the Report. Republican Senator Richard Michael DeWine of Ohio refused to do so,<sup>66</sup> highlighting that even the Republican Committee members could not agree upon a narrower Section 5 retrogression standard. With only nine signatures, the Senate Judiciary Committee Report was not signed by a majority of the full nineteen members of the Committee.<sup>67</sup> Finally, the Senate Judiciary Committee issued the report after the fact, following the passage of the House version of the reauthorization bill, further suggesting that the report should be accorded little, if any, weight by courts.

## II. CONSEQUENCES OF ADOPTING THE POST-PASSAGE SENATE JUDICIARY COMMITTEE REPORT'S NARROW INTERPRETATION OF SECTION 5: RISKING REINSTATEMENT OF *ASHCROFT*'S DEFERENTIAL STANDARD

Before analyzing the deference owed to the Senate Report, this Comment will examine how the Report's narrowing language changes Section 5's retrogression standard. Only by first understanding what retrogression standard the reauthorized Section 5 established in overturning *Ashcroft* and which "naturally occurring majority-minority districts" Section 5 covers can the significance of the Senate Report's interpretation of Section 5 be determined.

### A. "Ability to Elect" Absent the Senate Judiciary Committee Report

Although the reauthorized Voting Rights Act reinstates the retrogression standard articulated by the Supreme Court in *Beer*,<sup>68</sup> it is unclear what types of districts the *Beer* standard established. Post-*Beer*, the Supreme Court appeared to focus on preserving majority-minority districts, leaving open the question of which other districts are covered under *Beer*'s retrogression standard. In contrast, the *Ashcroft* Court identified for

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<sup>66</sup> See Stern, *supra* note 15 (noting that Senator Mike DeWine of Ohio, whose spokesperson noted that the Senator "did not think the committee report was indicated in this case," was "the sole Republican who did not sign the report").

<sup>67</sup> See 152 CONG. REC. S8372 (daily ed. July 27, 2006) (statement of Sen. Leahy) (noting that "only nine Republican members of the committee, less than a majority, endorsed the report").

<sup>68</sup> See *Beer v. United States*, 425 U.S. 130, 141 (1976) (upholding a redistricting scheme that preserved the number of majority-minority districts); see also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 335 (2000) (finding no retrogression where no majority-minority districts existed under the benchmark plan).

the first time which types of districts satisfy Section 5 preclearance. The broad non-retrogression standard *Ashcroft* adopted permitted jurisdictions to replace majority-minority districts—districts in which minorities constituted more than fifty percent of the population—with influence or coalition districts<sup>69</sup>—districts in which minorities may constitute as little as twenty-five percent of the voting age population—without violating Section 5.<sup>70</sup> Neither before *Ashcroft* nor in *Ashcroft* itself has the Court ever established whether it interprets Section 5 as focusing only upon the relative number of majority-minority districts before and after the proposed voting or redistricting change.

Michael A. Carvin, Former Deputy Assistant General to the Department of Justice's Civil Rights Division, and Professor Nathaniel Persily of the University of Pennsylvania both testified in hearings before the Senate Judiciary Committee regarding the difficulty of determining the scope of *Beer's* retrogression standard.<sup>71</sup> Both agreed that Section 5's "ability to elect" language covers more than majority-minority districts and other districts with a "magic number" percentage of minorities relative to the overall population.<sup>72</sup> Such a formulation ignores the numerous factors affecting minorities' "ability to elect" in each jurisdiction.<sup>73</sup> Instead, "ability to elect" and the effects of redistricting "will depend on the political characteristics of the area in which the district is drawn."<sup>74</sup> Under this more nuanced understanding of "ability to elect," Section 5 should protect not only majority-minority districts, but also "control" dis-

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<sup>69</sup> See *supra* notes 28-29 and accompanying text (defining influence and coalition districts, and explaining criticisms of these concepts).

<sup>70</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 487-88 (2003).

<sup>71</sup> See *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 136-43 (2006) [hereinafter *Legislative Options Hearing*] (statement of Michael A. Carvin, Partner, Jones Day); *Benefits and Costs Hearing*, *supra* note 50, at 198-203 (statement of Nathaniel Persily, Professor of Law and Political Science, University of Pennsylvania).

<sup>72</sup> *Benefits and Costs Hearing*, *supra* note 50, at 201 (statement of Nathaniel Persily, Professor of Law and Political Science, University of Pennsylvania); see also *Legislative Options Hearing*, *supra* note 71, at 10-11 (statement of Michael A. Carvin, Partner, Jones Day) (explaining that in "districts where minorities are not sufficiently large that they constitute a majority in a district but they are, nonetheless, sizable enough that they can form a coalition with non-minority votes," minorities are still able to elect their candidates of choice and therefore these districts are covered by the VRARA's "ability to elect" language).

<sup>73</sup> See *Benefits and Costs Hearing*, *supra* note 71, at 201-02 (statement of Nathaniel Persily, Professor of Law and Politics, University of Pennsylvania) ("[T]he effect of redrawing lines on minorities' ability to elect will vary across space, time and groups.").

<sup>74</sup> *Id.* at 202.

tricts<sup>75</sup>—districts in which minorities retain political control because they can form a “winning coalition” with non-minority voters.<sup>76</sup> Jurisdictions under this formulation will be deemed to retrogress and violate Section 5 if they replace either majority-minority or control districts with influence or coalition districts.<sup>77</sup>

The House Report affirms this interpretation of “ability to elect” by explaining that Congress intended to focus Section 5 on a minority group’s ability to “control the outcome of an election.”<sup>78</sup> In rejecting *Ashcroft*, the House Report described the definitions of influence or coalition districts as being unmanageable standards that fall short of guaranteeing that minority groups’ electoral power has not been diminished.<sup>79</sup> Nor was the House Report the only indication that Congress as a whole shared this concern. Both Representative Sensenbrenner,<sup>80</sup> the sponsor of the House bill, and the Senate Judiciary Committee, which issued the controversial post-passage report, condemned influence and coalition districts as failing to ensure that minorities retain their ability to elect their candidates of choice.<sup>81</sup>

Although Section 5 clearly covers “cracking”—breaking up concentrated minorities into a larger number of districts (such as replacing majority-minority districts with influence or coalition districts<sup>82</sup>)—what is less evident is whether Section 5 protects against “packing,” which involves placing minorities in a smaller number of districts in which they make up

<sup>75</sup> *Id.* at 200.

<sup>76</sup> *Legislative Options Hearing*, *supra* note 50, at 139 (statement of Michael A. Carvin, Partner, Jones Day).

<sup>77</sup> *Id.*; *Benefits and Costs Hearing*, *supra* note 50, at 200-02 (statement of Nathaniel Persily, Professor of Law and Politics, University of Pennsylvania). It is less clear whether Section 5 protects a control district from being replaced by a coalition district, as even the Senate Report’s conflicting legislative documents have not specifically addressed this point.

<sup>78</sup> H.R. REP. NO. 109-478, at 70 (2006) (Conf. Rep.).

<sup>79</sup> *Id.*

<sup>80</sup> See 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary) (“[T]he purpose of the preclearance requirement is to protect the ability of minority citizens to elect their preferred candidates of choice.”).

<sup>81</sup> See S. REP. NO. 109-295, at 19 (2006) (Conf. Rep.) (disapproving of the Court’s use of “vague concepts such as influence, coalition, and opportunity”).

<sup>82</sup> *Id.* Even with “cracking,” Section 5 coverage may depend on the degree to which a proposed redistricting plan “cracks” the minority community. For example, a proposed plan that splits a minority group comprising fifty percent of the population under the benchmark plan into two districts in which the group makes up only forty-five percent in the original district is probably less likely to be denied preclearance as retrogressive than a plan in which the minority group after redistricting comprises only thirty percent of the population in that district.

a greater percentage of the population.<sup>83</sup> Professor Persily's testimony argues that "packing" presently poses a greater risk to minority electoral power than "cracking," because "packing" allows for significant partisan maneuvering and district line manipulation.<sup>84</sup> By reducing minorities' influence to a smaller number of districts, jurisdictions dilute minorities' ability to affect the political process and elect their candidates of choice.<sup>85</sup>

Although the "plain language" of the reauthorized Section 5 never explains whether both "cracking" and "packing" are retrogressive, legislative history indicates that Congress intended to bar both redistricting tactics. First, Section 5 prohibits *any* voting-related change that "diminishes" a minority group's "ability . . . to elect."<sup>86</sup> Strikingly, it does not contain an accompanying narrowing definition that limits retrogression to "cracking."

Moreover, in disapproving of *Ashcroft*, the House Report explicitly frowns upon allowing states to make "trade-offs," where the changes are in reality "nothing more than a guise for diluting minority voting strength."<sup>87</sup> The House Report explains that by being highly deferential to covered jurisdictions, *Ashcroft's* understanding of Section 5 makes federal scrutiny "a wasteful formality."<sup>88</sup> If Congress is primarily worried about any attempt to thwart minority electoral power, as the House Report indicates, then Section 5 must protect majority-minority districts and minority "control" districts against both "packing" and "cracking," given that "packing" potentially poses a greater threat to minority voting strength than "cracking" and that the VRARA provides no limiting language contradicting this understanding. Thus, absent the Senate Report, Section 5's "ability to elect" standard not only protects majority-minority and minority control districts from being replaced by influence or coalition districts that dilute minority voting strength through "cracking," but

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<sup>83</sup> See *Benefits and Costs Hearing*, *supra* note 71 (statement of Nathaniel Persily, Professor of Law and Politics, University of Pennsylvania) (describing packing as "the overconcentration of minorities among too few [districts]").

<sup>84</sup> See *id.* ("Over the proposed 25 year tenure of [the] bill, packing will likely pose a greater risk to minority political opportunity than will cracking . . .").

<sup>85</sup> See *id.* ("[A] jurisdiction might dilute the minority vote by splitting large minority communities among several districts in which they really have no influence at all.").

<sup>86</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(b), 120 Stat. 577, 580-81 (2006).

<sup>87</sup> H.R. REP. NO. 109-478, at 70 (2006) (Conf. Rep.) (quoting *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 50 [hereinafter *VRA Hearings*] (statement of Laughlin McDonald, Director, ACLU Voting Rights Project)).

<sup>88</sup> *Id.*



also protects minorities from being "packed" into a smaller number of districts.

### B. "Naturally Occurring Majority-Minority Districts"

Similar to the *Beer* retrogression standard, the Senate Report's assertion that minorities' "ability to elect" includes only "naturally occurring majority-minority districts"<sup>89</sup> appears at first glance to be clouded with ambiguity. Never before has any court used the words "naturally occurring majority-minority districts,"<sup>90</sup> nor did the language appear in any of the preceding versions of the Voting Rights Act. Prior to being included in the Senate Report, the phrase "naturally occurring" appeared only in Anne Lewis's testimony before the House of Representatives.<sup>91</sup>

Lewis used the "naturally occurring" language only once in her testimony, describing enforcement of the original Voting Rights Act as eliminating "the gerrymandering tool of refusing to draw naturally occurring geographically compact majority-minority districts."<sup>92</sup> Unlike the Senate Report, Lewis never alleged that the amended Section 5 only covers and intends to protect such districts. Although the "naturally occurring" language can be traced to Lewis's testimony, it is still not clear how the Senate Report arrived at its determination that Section 5 only covers "naturally occurring" majority-minority districts.

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<sup>89</sup> S. REP. NO. 109-295, at 21 (2006) (Conf. Rep.). It is less clear whether coalition districts, which are not significantly discussed in either the House or Senate Report, also constitute "ability to elect" districts. Under the broader definition, coalition districts may also qualify.

<sup>90</sup> In past cases, the Supreme Court has only used the words "naturally occurring" in two contexts. First, the Court has used the language to refer to reasonably expected interpretations of language. *See, e.g.,* *United States v. Johnson*, 221 U.S. 488, 502 (1911) (arguing that the statutory language at issue would not "naturally occur" to a draftsman with a particular purpose). In the second group of cases, "naturally occurring" has referred to events or organisms that occur without human interference. *See, e.g.,* *Indus. Union Dep't v. Am. Petrol. Inst.*, 448 U.S. 607, 651 n.57 (1980) (using "naturally occurring" to describe the relative concentration of benzene); *Diamond v. Chakrabarty*, 447 U.S. 303, 305 (1980) (describing bacteria existing in the wild as "naturally occurring"); *Comm. for Nuclear Responsibility, Inc. v. Schlesinger*, 404 U.S. 917, 922 (1971) (describing earthquakes as "naturally occurring" events). Neither use is applicable to understanding majority-minority districts, and "naturally occurring" appears inapposite to a discussion of voting districts in general. By definition, districts are artificially created by humans, so there can be no "naturally occurring" majority-minority districts.

<sup>91</sup> *VRA Hearings*, *supra* note 87, at 30-37 (2006) (statement of Anne Lewis, Attorney, Strickland Brockington Lewis LLP).

<sup>92</sup> *Id.* at 34.

In narrowly interpreting Section 5's scope, the Senate Report effectively refutes the broader definition of "ability to elect" as covering all majority-minority districts as well as minority control districts, a definition that is supported by the rest of the legislative history.<sup>93</sup> Neither the Report nor Lewis's testimony explains in detail what a "naturally occurring" majority-minority district entails. The closest the Report comes is defining such districts as already having "a clear majority of minority voters."<sup>94</sup> Both Lewis's testimony and the Senate Report also describe "naturally occurring" majority-minority districts as differentiable from the redistricting schemes declared unconstitutional in the *Shaw v. Reno*<sup>95</sup> line of cases.<sup>96</sup> In these cases, the Supreme Court invalidated partisan gerrymandering schemes in which districting was predominantly motivated by race, as evidenced by district lines so bizarrely drawn that they could not be justified by any legitimate concern.

Thus, it appears that the "naturally occurring" majority-minority district, as defined and employed by the Senate Report, covers all majority-minority districts that do not appear to violate *Shaw*'s prohibition on race-driven gerrymandering. So long as a given redistricting scheme's district boundaries can be justified by a legitimate redistricting concern and do not seem so bizarrely shaped as to implicate overriding racial concerns, the majority-minority districts the plan creates should be considered "naturally occurring."

Specifically, the Senate Report disapproves of the "increased substitution of partisan interests" through the Democratic Party's gerrymanders, such as the replacement in *Ashcroft* of Georgia's majority-minority districts with influence and coalition districts.<sup>97</sup> Elsewhere, the Report avers that Section 5 intends to bar the "cracking or fragmenting [of] geographically compact minority voting communities."<sup>98</sup> By articulating such concerns narrowly, the report appears to exclude "packing" from the retrogression definition. This means that covered jurisdictions would be free to con-

<sup>93</sup> See *supra* Part II.A.

<sup>94</sup> S. REP. NO. 105-295, at 15.

<sup>95</sup> 509 U.S. 630 (1993); see also *Miller v. Johnson*, 515 U.S. 900, 915-17 (1995) (explaining the *Shaw* standard).

<sup>96</sup> See *VRA Hearings*, *supra* note 87, at 34 (statement of Anne Lewis, Attorney, Strickland Brockington Lewis LLP) (differentiating "naturally occurring" majority-minority districts from "more cartographically obvious methods" which politically gerrymander to create bizarrely shaped districts such as those struck down in *Shaw*); S. REP. NO. 105-295, at 20 (explaining the Committee's concern that jurisdictions can use Section 5 to meet partisan interests through gerrymandering).

<sup>97</sup> S. REP. NO. 105-295, at 20.

<sup>98</sup> *Id.* at 19 (internal quotation marks omitted).

concentrate minority groups into a smaller number of districts for partisan purposes, even though this concentration defeats Section 5's broad aim of protecting minorities' "ability to elect" their candidates of choice.<sup>99</sup>

Thus, if accorded authoritative interpretive weight, the Senate Judiciary Committee's report would narrow Section 5's scope to apply only to a subset of majority-minority districts, rather than to all majority-minority districts and minority control districts, while also excluding "packing" from the definition of retrogression barred by Section 5. By effectively restricting the federal government's enforcement powers, the Senate Report's understanding of Section 5 resembles *Ashcroft's* deferential approach to retrogression, the very standard struck down by the reauthorized Section 5.

### III. DETERMINING WHAT TYPE OF LEGISLATIVE HISTORY THE APPENDED COMMITTEE REPORT SHOULD CONSTITUTE

Where a statute's "language is plain and admits no more than one meaning" of congressional intent, courts will not<sup>100</sup> or are very reluctant<sup>101</sup> to consult legislative history—the statute's internal pre-history of "institutional progress . . . and the deliberation accompanying that progress."<sup>102</sup> However, the Supreme Court has repeatedly departed from this "plain meaning rule" by using legislative history to confirm its statutory interpretations.<sup>103</sup> It is "the nearly universal view among federal judges" that their "primary responsibility, within constitutional limits, [is] to subordinate [their] wishes to the will of Congress because the legislators' col-

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<sup>99</sup> See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 271-72 (2004) (describing a Republican-led redistricting plan in Pennsylvania that concentrated minorities into a smaller number of majority-minority districts, thereby resulting in a higher number of Republican legislators). Here, the narrow interpretation of Section 5 appears to be a tactic driven by partisan interests.

<sup>100</sup> *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

<sup>101</sup> See *BedRoc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004) (observing "long-standing precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text").

<sup>102</sup> WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 937 (3d ed. 2001); see also OTTO HETZEL, MICHAEL LIBONATI & ROBERT WILLIAMS, *LEGISLATIVE LAW AND PROCESS* 438 (2d ed. 1993) (providing a checklist of "legislative history" materials ranging from committee hearing transcripts to recorded votes).

<sup>103</sup> See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 288-89 (1990) (showing that in the 1988-1989 term, the Supreme Court was "not running wild in its use of legislative history," rarely using it to contradict its own legislative understanding).

lective intention . . . trumps the will of the court.”<sup>104</sup> Thus, where the text appears ambiguous or is susceptible to more than one interpretation, courts often consult congressional materials to derive legislative intent.

The amount of deference due to such legislative materials depends on their type and nature. There is a generally recognized hierarchy of congressional sources that designates which sources are most authoritative.<sup>105</sup> Courts attribute more interpretive significance to committee reports and statements by a bill’s primary sponsor than they do to statements by other individual legislators, floor debates, and postenactment history.<sup>106</sup>

Given that legislative history is inherently interpretive, however, being made up of numerous materials that may contradict one another, and that looking to legislative history necessarily considers materials not voted upon by the entire Congress,<sup>107</sup> there is no clear, correct doctrinal answer that categorically predetermines which sources will be considered significant and which will be discarded. Since “consistent and uniform rules for statutory construction . . . are not being followed today,” Judge Patricia M. Wald has described using legislative analysis as “akin to looking over a crowd and picking out your friends.”<sup>108</sup> It is particularly for this reason that new textualists such as Justice Antonin Scalia and Judge Frank H. Easterbrook oppose the use of legislative history, considering these materials unauthoritative.<sup>109</sup> Rather, they see Congress as having a “voice as a

<sup>104</sup> *Id.* at 281; see also *Public Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 453 n.9 (1989) (“[I]t [does not] strike us as in any way ‘unhealthy’ or undemocratic to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result is not ‘absurd.’” (citations omitted)).

<sup>105</sup> See George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-42 (providing the “rough hierarchy” of legislative materials beginning with the most persuasive sources: committee reports, sponsor floor statements, floor manager explanations, other statements by committee members, statements by noncommittee members, and statements by bill opponents).

<sup>106</sup> *Id.*

<sup>107</sup> See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (“The great flood of legislative history suggests that members of Congress can scarcely be expected to master the secondary materials of the bills upon which they vote.”).

<sup>108</sup> Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (internal quotation marks omitted).

<sup>109</sup> See, e.g., *Johnson v. United States*, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting) (refusing to condone the majority’s reliance on legislative history because the Court’s “obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68-69 (1994) (“[T]he only way the leg-

constitutional player only through its finally enacted statutes, not through any supplementary explanation thereof."<sup>110</sup>

Despite such reservations and at least three justices who espouse new textualism,<sup>111</sup> the Supreme Court continues to consider legislative history relevant to interpreting ambiguous statutory language.<sup>112</sup> Given that the VRARA fails to articulate a clear retrogression standard for Section 5, providing only that covered jurisdictions must not diminish a minority group's ability "to elect their preferred candidates of choice" and that Congress disapproves of *Ashcroft*,<sup>113</sup> courts interpreting this legislation will likely consider legislative history.

The remaining question is whether the Senate Judiciary Committee Report in particular should and will be an authoritative legislative source used to constrict the scope of Section 5's preclearance mechanism. Since the Senate committee charged with overseeing the bill's consideration and passage issued the Report, but only after both houses of Congress had already voted for the bill, the Report could be characterized as either a committee report or postenactment legislation. This characterization will determine in part how significant or controlling the report should and will be in construing Section 5's retrogression standard.

#### A. *Characterizing the Report as a Typical Committee Report Entitled to Significant Deference*

Ordinarily, a report prepared by the Senate Judiciary Committee, the committee overseeing the passage and consideration of the VRARA, would be entitled significant weight as legislative history.<sup>114</sup> Despite the

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islature issues binding commands is to embed them in a law." (emphasis omitted)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (arguing that the judiciary ought not to look to legislative history in interpreting statutes).

<sup>110</sup> Wald, *supra* note 103, at 285.

<sup>111</sup> See ESKRIDGE ET AL., *supra* note 102, at 956 (remarking that Justice Scalia's new textualist approach is usually joined by Justice Thomas, and sometimes by Justice Kennedy).

<sup>112</sup> See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 14 (1998) (showing that the Rehnquist Supreme Court's use of legislative history increased in the mid-1990s, which "suggest[s] that the textualists' challenge to 'intent' as an anchoring concept has yet to succeed").

<sup>113</sup> See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(b), 120 Stat. 577, 578-80 (2006).

<sup>114</sup> See ESKRIDGE ET AL., *supra* note 102, at 947 ("Most judges and scholars agree that . . . a statement in a committee report will usually count more than a statement by a single legislator."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 674 (1997) ("[T]he Court has routinely treated the declarations of intent found in committee

considerable interpretative debates over whether to accord legislative history any weight at all,<sup>115</sup> committee reports are widely considered to be more reliable and therefore more persuasive than any other type of legislative history.<sup>116</sup> As opposed to statements by individual legislators, a committee report constitutes a collective statement prepared by the subcommittee that is entrusted with overseeing the bill and therefore is most knowledgeable about its intricacies.

By clearly summarizing the bill's aim and supporting findings and then explaining the bill section by section, a committee report's structure and format are especially conducive to determining legislative intent regarding specific provisions of an act.<sup>117</sup> In fact, "committee reports are more like judicial opinions than most documents that the legislative process generates" because they offer "a deliberative rationale and argument for passage of the law."<sup>118</sup> Moreover, Congress can be deemed to have delegated "explanatory authority" to the overseeing committee "with the implicit understanding that their exposition will influence courts."<sup>119</sup>

Not surprisingly, the Supreme Court has consistently cited and considered committee reports more than any other type of legislative history, and very often more than all other sources of legislative history combined.<sup>120</sup> In numerous cases interpreting Section 5 of the VRA, the Supreme Court has cited committee reports to support its construction of the provision.<sup>121</sup> Similarly, on its face, the 2006 Senate Judiciary Commit-

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reports . . . as especially 'authoritative' evidence of the intent of Congress as a whole."); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI-KENT L. REV. 365, 374-75 (1990) ("[T]he committee report is an authoritative context for choosing among alternative meanings of the text.").

<sup>115</sup> See *supra* notes 109-110 and accompanying text (describing new textualists' dismissal of legislative materials as unauthoritative).

<sup>116</sup> See ESKRIDGE ET AL., *supra* note 102, at 947 (noting that committee reports are generally accorded more weight than other legislative materials); Wald, *supra* note 103, at 306 ("[L]egislative history is the authoritative product of the institutional work of the Congress."); see also Costello, *supra* note 105, at 41 (placing committee reports at the top of the hierarchy of possible legislative history sources).

<sup>117</sup> Costello, *supra* note 105, at 41.

<sup>118</sup> Schacter, *supra* note 112, at 43 (emphasis omitted).

<sup>119</sup> Manning, *supra* note 114, at 694.

<sup>120</sup> See Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 tbl.2 (1982) (showing that committee reports alone comprised over forty-five percent of all legislative history references from 1938 to 1979); Schacter, *supra* note 112, at 15 (finding that "by far the leading source consulted is the congressional committee report").

<sup>121</sup> See *Abrams v. Johnson*, 521 U.S. 74, 95-96 (1997) (treating language from the Senate report accompanying the 1975 reauthorization of Section 5 "at the very least as an equi-

tee Report's narrow construction of minorities' "ability to elect" could be considered relevant, if not authoritative, legislative history.

Nonetheless, committee reports are neither categorically entitled to nor universally accorded significant deference, especially where they appear suspicious as planned colloquies<sup>122</sup>—politically strategic maneuvers by individual or groups of legislators to "smuggle in" helpful lobbyist language without the consent of other members of Congress.<sup>123</sup> Because the members of the subcommittee overseeing the legislation prepare these reports alone, their findings and characterizations of the bill have not been scrutinized or approved by Congress as a whole, raising doubt as to whether these documents accurately reflect the congressional understanding of the bill. In response to these concerns, state courts, while still admitting committee bill reports as indicia of legislative intent, typically accord them little weight, presuming instead that they are unpersuasive representations of congressional intent.<sup>124</sup>

In light of such bootstrapping suspicions, the Senate Judiciary Committee Report's appended, post-passage, and particularly controversial nature significantly curtails its persuasiveness. Released after the House already passed its version of the bill that would become law when signed by President Bush, the Senate Report can be seen as an end-of-the-game strategic move by individual members of the Judiciary Committee to smuggle in constricting language to significantly limit Section 5's preclearance provision.<sup>125</sup> The Report is particularly troubling because it is inconsistent both with the House Judiciary Committee's report on the House version of the bill,<sup>126</sup> as well as with the dissenting Senate Judiciary

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table factor to take into account, if not as a statutory mandate"); *McDaniel v. Sanchez*, 452 U.S. 130, 147-52 (1981) (explaining in detail how the Senate Report from Section 5's reauthorization in 1975 confirms the Court's understanding of preclearance); *City of Rome v. United States*, 446 U.S. 156, 169, 199-200 (1980) (explaining that the Court is bound by the "unambiguous congressional intent" articulated in both the House and Senate majority committee reports); *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32, 46 (1978) (finding the committee reports accompanying Section 5's reauthorization in 1975 to be of particular relevance).

<sup>122</sup> William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect on the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1314 (1959).

<sup>123</sup> See *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (arguing that it is unreasonable to assume that a committee report "come[s] to the attention of, much less [is] approved by, the house" enacting the bill).

<sup>124</sup> *ESKRIDGE ET AL.*, *supra* note 102, at 964.

<sup>125</sup> This precise charge has been made by the dissenting Democratic members of the committee. See *supra* notes 63-65 and accompanying text.

<sup>126</sup> See *supra* notes 86-88 and accompanying text (explaining how the House Report strikingly omits and to some degree conflicts with the Senate Report's narrow understanding of Section 5).

Committee Democratic members' understanding of the legislation.<sup>127</sup> In effect, there are dueling committee reports offering conflicting understandings of Section 5. Strikingly, the Senate Report differs from all past Supreme Court cases citing to the VRA because all of these cases had coinciding Senate and House Reports, or at least did not have dueling understandings.<sup>128</sup> Especially given its post-passage nature, the Senate Judiciary Report cannot be accorded significant weight simply because it is a committee report. Rather, its level of persuasiveness rests on who is considered to best constitute "Congress" and, thus, whether the report is the best measure of legislative intent.<sup>129</sup>

B. *Viewing the Report as Akin to Postenactment Legislation  
Accorded Little to No Deference*

The Senate Judiciary Committee's July 26, 2006 Report could also be characterized as a form of postenactment legislation, given that it reports on the substantially identical Senate version of the House reauthorization bill that had already been passed by both houses of Congress.<sup>130</sup> Unlike committee reports, which are generally accorded significant weight, "post-enactment pronouncements are ordinarily not dispositive regarding congressional intent," according to the Supreme Court's repeated assertions.<sup>131</sup> Unsurprisingly, this reluctance is particularly pronounced among new textualists, such as Justices Clarence Thomas and Antonin Scalia, who already doubt whether legislative history such as committee reports, which are generally acknowledged to be worthy of significant consideration, should weigh upon a Court's determination of congressional intent.<sup>132</sup>

<sup>127</sup> See *supra* notes 17, 63-65, and accompanying text (describing the Democratic Senate Judiciary Committee members' vehement dissent from the Report and contrary understanding of Section 5).

<sup>128</sup> See cases cited *supra* note 121.

<sup>129</sup> See *infra* Part IV (analyzing the report's persuasiveness according to different understandings of what best embodies "Congress").

<sup>130</sup> See *supra* notes 12-13 and accompanying text.

<sup>131</sup> See, e.g., *United Ass'n of Journeymen v. Reno*, 73 F.3d 1134, 1144 (D.C. Cir. 1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992)); see also *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight").

<sup>132</sup> See, e.g., *Holder v. Hall*, 512 U.S. 874, 935-36 (1994) (Thomas, J., concurring) (accusing the majority of "abandoning proper methods of statutory construction" by interpreting and applying any legislative history aside from acts of Congress); *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring) (characterizing postenactment history "of a statute's consideration and enactment" as a "contradiction in terms," which "should not be taken seriously, not even in a footnote").



Postenactment legislative history, in actively interpreting already considered congressional legislation through the eyes of members of a later Congress, inherently runs the risk of representing only the "legislative future" of a bill.<sup>133</sup> Courts are thus presumptively suspicious of legislative history that may well unilaterally append a new statutory interpretation that had never been considered by, and may significantly depart from, the intended interpretation of the Congress that passed the bill.

Similarly, the appended Senate Judiciary Committee Report accompanying the already passed VRARA bill should also be treated with suspicion. Even though the Report is technically preenactment, the Senate Judiciary Committee issued it only after both the House and Senate had already considered and passed the bill, and one day before the President signed the virtually identical House version of the bill. Thus, the Report is, in practice, just as problematic as postenactment legislation: it had been appended after Congress already considered the legislation, without even providing Congress as a whole an opportunity to read it.

Despite what appears to be a general distrust of appended legislative history, particularly postenactment legislation, the Senate Judiciary Committee Report may still be entitled to weight given the limited types of postenactment legislative history that have been addressed in previous cases by the Supreme Court and the various federal courts of appeals. Existing postenactment legislative case law falls into two main categories, covering (1) statements of individual legislators from the same Congress that passed the initial bill, and (2) remarks and reports made by subsequent Congresses that did not pass or amend the legislation. I will now analyze the Senate Report accompanying the VRARA in light of each of these bodies of case law.

### 1. Case Law for Same-Congress Individual Legislator Statements

In the few cases involving postenactment statements by individual members of the same Congress that passed the legislation, courts have repeatedly refused to accord these statements any weight.<sup>134</sup> As it is,

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<sup>133</sup> *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 733 (D.C. Cir. 2000).

<sup>134</sup> *See, e.g., Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (refusing to consider a Senator's postenactment amicus brief discussing various proposals which Congress considered but failed to enact); *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 832 n.28 (1983) (explaining that an individual statement unilaterally appended to an already considered Senate conference does not deserve the same weight as a published conference report); *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 117-19 (1980) (refusing to consider even the remarks of the legislator-sponsor from a subsequent

courts usually disregard individual legislator statements as representing only the "personal and anecdotal experience of someone in the legislative process,"<sup>135</sup> as opposed to the collective understanding of Congress as a whole.<sup>136</sup> Courts find even less reason to allow postenactment statements by individual legislators to control the interpretation of ambiguous portions of a statute. Rather, such statements are considered to be "too late to have any [desired] effect."<sup>137</sup>

Courts even refuse to consider statements made by the bill's sponsor, who is generally accorded greater deference due to her particular expertise and understanding of the bill. For example, in *Fogg v. Ashcroft*, the Court of Appeals for the District of Columbia refused to give an introductory statement of the bill's sponsor any "material weight" because it was made after the bill had been voted upon earlier in the day.<sup>138</sup> In fact, a note in the Congressional Record explains that the portions of the speech the bill's sponsor sought to introduce had been "inserted or appended, rather than spoken . . . on the floor."<sup>139</sup>

This case law is particularly relevant to the section of the Senate Report in which Republican Senators Cornyn and Coburn argued that Congress, strapped for time and under significant political pressure, failed to adequately consider alternatives to Section 5.<sup>140</sup> Although the Senate Report included these remarks, it did so only under the heading of "Additional Views of Mr. Cornyn and Mr. Coburn,"<sup>141</sup> explicitly representing only two senators' viewpoints. Stating that the final report was a "very different document from the draft Report circulated by the Chairman," the Senate Democrats vehemently disagreed with Senators Cornyn and

Congress); *Gen. Instrument Corp.*, 213 F.3d at 733 (refusing to consider a postenactment letter from the amendment's sponsor).

<sup>135</sup> *United Ass'n of Journeymen*, 73 F.3d at 1139 n.4 (quoting the Department of Justice's response to the plaintiff's attempt to introduce individual legislator remarks as persuasive legislative history).

<sup>136</sup> See *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 209 (1978) (Powell, J., dissenting) (arguing that weight should be accorded to legislative history here, in departure from previous precedent, because the record indicates that there was "no effort here to 'bootstrap'", *superseded by statute on other grounds*, 16 U.S.C. 1536(h) (2000); *United States v. Price*, 361 U.S. 304, 313 (1960) (refusing to consider subsequent congressional materials because they form a "hazardous basis" for properly inferring intent).

<sup>137</sup> *Fogg v. Ashcroft*, 254 F.3d 103, 108 (D.C. Cir. 2001).

<sup>138</sup> *Id.* at 108-09.

<sup>139</sup> *Id.* at 109 (quoting 137 CONG. REC. 30,506 (1991)).

<sup>140</sup> S. REP. NO. 109-295, at 25-36 (2006) (Conf. Rep.).

<sup>141</sup> *Id.* at 25.

Coburn's characterization of the legislative process.<sup>142</sup> The Democratic senators contended that neither the Republican Senate Judiciary Committee members nor any other senators mentioned the Senate Report's concerns on the floor during consideration of the bill, and that this assessment did not "reflect [their] views or those of scores of other cosponsors."<sup>143</sup> Moreover, Representative Sensenbrenner, the sponsor of the House version of the bill that was ultimately signed into law, directly countered the portrayal of the legislative process by Senators Cornyn and Coburn. Representative Sensenbrenner lauded Congress for engaging in "one of the most extensive considerations of any piece of legislation" that he had seen in over twenty-seven years in Congress.<sup>144</sup>

Because the Democratic senators' dissent as well as Representative Sensenbrenner's remarks reasonably raise the suspicion that Senators Cornyn and Coburn, similar to the bill sponsor in *Fogg*, merely appended remarks that cannot speak to "the premises on which the statute passed"<sup>145</sup> in an attempt to smuggle in helpful language, this portion of the Senate Report should not be accorded significant, if any, weight. In fact, courts have only accorded weight to "Additional Views" of particular legislators when they are deemed to be bill sponsors or proponents,<sup>146</sup> which neither of these senators even claims to be. There is further reason to discard Senator Cornyn's and Senator Coburn's statements: they do not actually interpret the language of Section 5, or argue for a particular construction of Section 5's ambiguous retrogression standard. Instead, the remarks merely explain these individual senators' reflections on the overall legislative process.

However, the postenactment case law involving same-Congress individual legislator statements is less controlling over the narrow interpretation of minority groups' "ability to elect" contained in both Senator Kyl's "Additional Views" in the Senate Report, and in the Report itself.<sup>147</sup> Unlike the assessment of the legislative deliberation process provided by Senators Cornyn and Coburn, both Senator Kyl and the Report's narrow-

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<sup>142</sup> *Id.* at 54.

<sup>143</sup> *Id.*

<sup>144</sup> 152 CONG. REC. H5143 (daily ed. Jul 13, 2006) (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary).

<sup>145</sup> *Fogg v. Ashcroft*, 254 F.3d 103, 109 (D.C. Cir. 2001).

<sup>146</sup> *See, e.g., Garrett v. United States*, 471 U.S. 773, 783-85 (1985) (according weight to the "Additional Views" of four legislators where one of them was the sponsor of the language in question); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 335 n.12 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring) (citing the "Additional Views of Seven Representatives" because they were "proponents" of the legislation).

<sup>147</sup> S. REP. NO. 109-295, at 18-24 (2006) (Conf. Rep.).

ing language addressed Section 5's specific language, making it directly applicable to a judicial analysis of Section 5's ambiguous retrogression standard. This definition of "ability to elect" also appeared in the main body of the Senate Report, thereby representing the collective understanding of almost all of the Republican members of the Senate Judiciary Committee. Since committee reports are considered to be more persuasive than individual member remarks,<sup>148</sup> and because Senator Kyl's "Additional Views" directly coincide with the Report's statutory interpretation, the case law regarding same-Congress individual legislator statements is neither particularly helpful nor applicable. Instead, these sources appear to necessitate greater judicial consideration than the remarks of Senators Cornyn and Coburn. Nonetheless, the conflict between the Senate Report and Senator Kyl's narrow "ability to elect" standard on the one hand and the House Report and Senate Democrats' refusal to constrict Section 5's language on the other still raises bootstrapping concerns, namely that the Senate Report is a political document, rather than one reflecting collective congressional intent.

## 2. Case Law for Subsequent Congressional History

The second body of case law dealing with postenactment legislation involves pronouncements from subsequent Congresses not involved in the initial passage of the bill. In such cases, the Supreme Court has almost universally rejected statements of individual legislators that run the risk of misrepresenting congressional understandings of a statute.<sup>149</sup> In comparison to turning to already-suspicious individual legislator statements from the same Congress,<sup>150</sup> "[i]t is far worse" to rely on the opinions of "a few members of a later Congress."<sup>151</sup>

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<sup>148</sup> See *supra* notes 116, 120, and accompanying text.

<sup>149</sup> See *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) ("[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have very little, if any, significance." (internal quotation marks omitted)); *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974) (arguing that such statements are entitled to little or no weight); *United Ass'n of Journeymen v. Reno*, 73 F.3d 1134, 1139 n.4 (D.C. Cir. 1996) ("It is bad enough to interpret a statute on the basis of what a later Congress says about it. It is far worse to rely on the views—not of a later Congress—but of a few members of a later Congress." (citation omitted)); *Multnomah Legal Servs. Workers Union v. Legal Servs. Corp.*, 936 F.2d 1547, 1555 (9th Cir. 1991) (refusing to allow "isolated committee remarks" to control the court's legislative interpretation).

<sup>150</sup> See *supra* notes 135-136 and accompanying text (explaining why courts consistently refuse to accord deference to individual legislators' statutory interpretations).

<sup>151</sup> *United Ass'n of Journeymen*, 73 F.3d at 1139 n.4.

Although the Supreme Court has been reluctant to accord significant weight to other legislative materials from subsequent Congresses, it has also refrained from categorically rejecting such materials. In several cases, the Court has cautioned against relying on subsequent legislative history to divine an earlier Congress's intent,<sup>152</sup> rejecting outright committee reports from subsequent Congresses.<sup>153</sup> The Court's overarching concern seems to be that such materials do not reflect or relate to what the bill's legislators understood they were voting for, and thus do not affect the meanings accorded by the legislative body that passed the bill.<sup>154</sup>

On the other hand, the courts have also suggested that there may be instances in which it would be "remiss" to ignore such "authoritative expressions concerning the scope and purpose" of a statute,<sup>155</sup> especially when there are several plausible interpretations of a statute's meaning<sup>156</sup> or when the materials are being used to derive Congress's current policy goals.<sup>157</sup> With the Senate Report, there is no concern that the Senate Judiciary Committee members were not part of the same institution (the 109th Congress) that considered the initial reauthorization bill. Although the Senate Report eliminates this different-institutions concern, the Court's reluctance to consider even statements made by bills' original sponsors<sup>158</sup> signals that it remains wary of any interpretations that have

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<sup>152</sup> See *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) (expressing "grave doubts" that legislation that subsequent Congresses considered but failed to enact is "of any value in construing [the legislation's] provisions"); *United States v. Sw. Cable Co.*, 392 U.S. 157, 170 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance." (internal quotation marks omitted)); *United States v. Price*, 361 U.S. 304, 313 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

<sup>153</sup> See *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (refusing to accord weight to a committee report from a subsequent Congress); *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984) (rejecting the suggestion that committee reports accompanying subsequent legislation are entitled to any weight).

<sup>154</sup> See, e.g., *Sullivan*, 496 U.S. at 631-32 (Scalia, J., concurring) (refusing to accord any interpretative weight whatsoever to postenactment legislative history, or even to endorse its mention in a footnote).

<sup>155</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 686 n.7 (1979).

<sup>156</sup> See, e.g., *McCreary v. Offner*, 172 F.3d 76, 82 (D.C. Cir. 1999) ("[T]o determine whether [a statute] is reasonably susceptible to more than one meaning . . . post-enactment legislative commentary offering a plausible interpretation is certainly relevant, much like plausible interpretations from . . . any other source would be.").

<sup>157</sup> See *S. Cal. Edison Co. v. Fed. Energy Regulatory Comm'n*, 116 F.3d 507, 516 (D.C. Cir. 1997) ("With respect to Congress's current policy goals, as distinguished from retrospective legislative history, we find the [subsequent] committee reports . . . quite illuminating.").

<sup>158</sup> See, e.g., *Pittston Coal Group v. Sebben*, 488 U.S. 105, 118-19 (1988) (refusing to consider postenactment statements of a key sponsor which were not relied upon by legisla-

not been explicitly considered or debated by the congressional body, not to mention an interpretation that has met with vehement dissent from other members of the Senate Judiciary Committee entrusted with considering the bill.

Given the dearth of relevant case law similarly involving a post-passage congressional committee report from the same Congress that passed the bill, and the inability of the Senate Report to easily conform to an existing type of legislative history material, it is unclear what weight, if any, the Senate Report should be accorded. Instead, the Senate Report should control Section 5's interpretation only if it accurately reflects Congress's unexpressed intent, thus leading to another inquiry that is far from clear.

#### IV. ANALYZING WHETHER THE COMMITTEE REPORT ACCURATELY REPRESENTS THE INTERPRETATION OF SECTION 5 BY CONGRESS AS A WHOLE

Aside from the difficulty of determining whether the Senate Judiciary Committee Report constitutes a timely, same-Congress committee report entitled to significant weight or whether it is less significant, as post-passage legislation, the Report also conflicts with the Section 5 interpretations provided by the Democratic members of the Senate Judiciary Committee, the House bill's sponsor, and the House Judiciary Committee Report. Thus, in interpreting Section 5's retrogression standard, a court would be faced with dueling committee reports, forcing it to decide which understanding better represents congressional intent.

In two cases dealing with the Freedom of Information Act (FOIA)<sup>159</sup> exemptions, the federal courts addressed this very problem. After the Senate had already passed the bill, the House issued a committee report construing an exemption provision more expansively than the Senate's committee report. In *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, the Court of Appeals for the District of Columbia accorded more weight to the House Report, viewing it as more in line with floor debates.<sup>160</sup> By contrast, in *Department of the Air Force v. Rose*, the Supreme Court interpreted

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tors who enacted the law); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (refusing to consider the remarks made by a subsequent Congress's legislative sponsor); *Fogg v. Ashcroft*, 254 F.3d 103, 108-09 (D.C. Cir. 2001) (refusing to consider sponsor remarks made later on the same day that the bill passed); *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 733 (D.C. Cir. 2000) (refusing to consider a postenactment letter from the amendment's sponsor).

<sup>159</sup> 5 U.S.C. § 552 (2000).

<sup>160</sup> 670 F.2d 1051, 1061 (1981).

the same provision according to the Senate report because it was more consistent with judicial precedent and remaining legislative history that construed that application of the provision narrowly.<sup>161</sup>

These cases shed little light on the interpretive significance of the Senate Judiciary Committee Report; after all, the Report was issued post-passage, not merely after the House had finalized its vote on the bill. Moreover, the cases themselves arrived at different conclusions based on the particular application of the FOIA exemption, thereby highlighting how difficult it is to determine which of two dueling committee reports should be accorded weight and how this entire inquiry rests upon which committee report best represents Congress as a whole.

There are three different theories, each of which argues that the interpretation of a particular subsection or representative of Congress—be it (a) the bill's sponsor, (b) the marginal congressional voter, or (c) the statute itself—should control in light of conflicting understandings.

#### *A. Congress Represented by the Sponsor of the Enacted Bill's Language*

In resolving statutory ambiguity, the statements of the enacted bill's main sponsor are often considered authoritative, decisive evidence of legislative intent.<sup>162</sup> As with committees, sponsors have taken the lead in framing the overall legislation and working out its intricacies.<sup>163</sup> Unsurprisingly, courts may see sponsor statements as "privileged,"<sup>164</sup> presuming that Congress, in delegating sponsors such authority, intends for statutory ambiguities to be resolved by reference to their statements.<sup>165</sup> Thus, courts should not "second-guess" Congress's intentional, chosen form of organization.<sup>166</sup>

<sup>161</sup> 425 U.S. 352, 371-72 (1976).

<sup>162</sup> See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling, . . . those of the sponsor of the language ultimately enacted . . . are an authoritative guide to the statute's construction." (citation omitted)); *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 11-23 (1976) (using the statute's sponsor's statements, as well as committee reports and amendment history, to determine legislative intent); *Reynolds-Naughton v. Norwegian Cruise Line Ltd.*, 386 F.3d 1, 5 (1st Cir. 2004) (arguing that the views of the sponsors of the legislation's language are generally entitled to "special weight").

<sup>163</sup> Manning, *supra* note 114, at 693-94 (explaining that Congress paints "with a broad brush," delegating the "detail work" to sponsors and committees whose understandings should be privileged by courts).

<sup>164</sup> *Id.* at 694.

<sup>165</sup> *Id.* at 694-95.

<sup>166</sup> *Id.* at 694 (quoting Wald, *supra* note 103, at 307).

The difficulty with the Senate Judiciary Committee's Report is that its sponsor and the sponsor's accompanying interpretation of Section 5 are not immediately apparent. Senator Specter was the official sponsor of the Senate version of the bill.<sup>167</sup> As Chairman of the Senate Judiciary Committee, he helped author the Committee Report and clearly adopted the report's narrow construction of Section 5. If he is considered the sponsor of the reauthorized Voting Rights Act legislation, the committee report's interpretation of Section 5 should control under the sponsor theory of Congress.

However, it is far from clear that Senator Specter was indeed the bill's main sponsor. With all sponsor statements, there is the concern that they do not represent the understanding held by the average congressional voter.<sup>168</sup> This concern is reasonable given that individuals who are motivated to take the lead on particular types of legislation usually feel strongly about which direction the legislation should take, and are therefore vulnerable to disproportionately reflecting the "most interested interest groups."<sup>169</sup> With Senator Specter, this worry of congressional misrepresentation is particularly potent in light of the vigorous dissents from Democratic members of the same Committee.<sup>170</sup> Moreover, because the House of Representatives did not adopt a similarly narrow Section 5 understanding,<sup>171</sup> it is even harder to argue that Senator Specter's interpretation controls both houses' statutory intent.

There is still the argument that the House, in not similarly construing minorities' "ability to elect" as narrowly as the Senate, also failed to provide an alternate definition such that the two houses' understandings of Section 5 do not conflict. However, since the courts have already articulated their reluctance to adopt postenactment sponsor interpretations that do not accord with Congressional understandings,<sup>172</sup> Senator Specter's construction of Section 5 is unlikely to control.

Aside from his understanding not being clearly in line with Congress's collective intent, Senator Specter may not even be appropriately considered the sponsor of the reauthorized Voting Rights Act. Unlike

<sup>167</sup> S. REP. NO. 109-295, at 1 (2006) (Conf. Rep.).

<sup>168</sup> Manning, *supra* note 114, at 688.

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* notes 63-65 and accompanying text (describing the dissenters' charges).

<sup>171</sup> See *supra* Part II.A (explaining that absent the Senate Report, the House never adopted any narrowing understanding of Section 5 retrogression).

<sup>172</sup> See, e.g., *Pittston Coal Group v. Sebben*, 488 U.S. 105, 118-19 (1988) (refusing to consider postenactment statements of the key sponsor authoritative where they were not relied upon by the legislators who enacted the law).



with the House version of the bill, both houses of Congress never ultimately voted on and enacted the Senate bill into law. Representative Sensenbrenner, who took the lead in authoring the bill's language, officially sponsored the House version of the bill.<sup>173</sup> Throughout his introductory, floor, and signing statements, as well as the House Judiciary Committee Report, which he helped author as Committee Chairman, Representative Sensenbrenner never indicated that Section 5 covers only "naturally occurring majority-minority districts" or any other limiting language.<sup>174</sup> Instead, he consistently reiterated that Section 5's retrogression standard protects against efforts to "diminish the ability of minority groups to elect the preferred candidates of their choice," implying a broader construction of "ability to elect."<sup>175</sup> While Representative Sensenbrenner never explicitly specified that "ability to elect" should be broadly defined to encompass more than "majority-minority districts," courts have articulated that in some circumstances, the "silence of sponsors can be deemed significant."<sup>176</sup>

Congress as a whole seems to consider Representative Sensenbrenner the bill's main and original sponsor, frequently lauding him for his efforts to frame and advocate for the legislation.<sup>177</sup> Moreover, unlike Senator Specter, whose understanding of the Committee Report was articulated post-passage, Representative Sensenbrenner's preenactment remarks and report were timely, making his understanding appear more credible and reliable. Since the House bill was never amended, it con-

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<sup>173</sup> See 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary) ("I was proud to lead Republican efforts to renew expiring provisions of the Voting Rights Act in 1982, and I am pleased to have authored this important legislation to do the same thing a quarter century later:").

<sup>174</sup> See, e.g., H.R. REP. NO. 109-478 (2006) (Conf. Rep.) (explaining the reauthorized legislation without any mention of Section 5 covering only majority-minority districts); 152 CONG. REC. H5143-44 (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary) (laying out the Voting Rights Act when Representative Sensenbrenner signed the legislation without any narrowing understanding of retrogression).

<sup>175</sup> See H.R. REP. NO. 109-478, at 68-72 (presenting the House Judiciary Committee's construction of Section 5's retrogression standard without defining "ability to elect" as covering only a "naturally occurring" or any other type of majority-minority district); 152 CONG. REC. H5143 (statement of Rep. F. James Sensenbrenner, Chairman, H. Comm. on the Judiciary) (signing the bill while explaining that the enacted House bill protects "the ability of minority citizens to elect their preferred candidates of choice").

<sup>176</sup> Costello, *supra* note 105, at 51.

<sup>177</sup> See, e.g., 152 CONG. REC. S8372 (daily ed. July 27, 2006) (statement of Sen. Leahy) (thanking Representative Sensenbrenner and others for working hard to assemble the record and to consider the House record); 152 CONG. REC. H5134 (statement of Rep. Lincoln Diaz-Balart) (commending Representative Sensenbrenner "for his determination and his leadership and strength of character in moving forward [the] legislation").

tains the same language and substance that it contained when Representative Sensenbrenner introduced it, thereby adding support to the argument that Congress had no intention of departing from his original interpretation of Section 5.<sup>178</sup>

The Democratic Senate Judiciary Committee members, in dissenting from the Senate Report, also claimed that they were sponsors of the legislation.<sup>179</sup> Although Senator Leahy, the ranking minority committee member, made opening statements regarding the Senate bill,<sup>180</sup> none of these senators was the official sponsor nor was involved in drafting the legislation. Thus, it is unlikely that their interpretations would be considered controlling sponsor pronouncements.

Under the sponsor theory of congressional intent, although there are other official or self-designated legislative sponsors, House Representative Sensenbrenner appears to be the main sponsor of the reauthorized Voting Rights Act. Because his statements indicate that he believes Section 5 to encompass more than merely “naturally occurring majority minority districts,” it is unlikely that a court adopting the sponsor congressional interpretation model would accord significant weight to the Senate Judiciary Committee’s Report.

### B. *Congress as the Median Congressional Voter*

Rather than deferring to the statutory interpretations of bill sponsors and the authors of the committee reports—likely supporters and advocates of the legislation—Congress may be better represented by the median voter, a hypothetical legislator whose policy preferences lie at the exact center of Congress.<sup>181</sup> The median voter theory recognizes that Congress is made up of not only supporters, but also individuals who disapprove of or are silent on the legislation until they vote. As Judge Frank H. Easterbrook explains, under this model, “[i]t would be better to pop the question to the *median* legislator, the one whose vote could change the outcome. . . . To put it differently: If you put the question of intent

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<sup>178</sup> See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (explaining that the sponsor of the “language ultimately enacted” has a controlling understanding of legislative intent).

<sup>179</sup> S. REP. NO. 109-295, at 54 (2006) (Conf. Rep.).

<sup>180</sup> See 152 CONG. REC. S3987 (daily ed. May 3, 2006) (statement of Sen. Leahy) (introducing the bill to the full Congress).

<sup>181</sup> See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (laying out the logic behind the median voter theory with respect to candidates’ policies and elections); REBECCA B. MORTON, *ANALYZING ELECTIONS 91-95* (2006) (same).

only to fervent supporters, the answer will not be useful."<sup>182</sup> Premised on the notion that the statutory interpretation of the median legislator at the fifty-first percentile would numerically control if legislators voted on which from among a set of conflicting understandings to adopt, the theory finds the median voter's viewpoint to be controlling.<sup>183</sup>

The Republican Party constituted the majority in both houses of the 109th Congress that passed the VRARA, making up approximately fifty-three and fifty-six percent of the House and Senate respectively.<sup>184</sup> If the Senate Report embodies the Republican Party's—and thus each Republican representative's and senator's—understanding of Section 5, the Report's interpretation would control even if all the independent and Democratic legislators dissented.

However, there appears to be no clear consensus on the Report's meaning even among Republican members of Congress. Although Republican members of the Senate Judiciary Committee authored and supported the Senate Report, not even all Republican Committee members signed the Report.<sup>185</sup> Republican members of the House Judiciary Committee also headed and supported the House Report, which did not adopt a similarly narrow construction of Section 5. Moreover, Republican Representative Sensenbrenner, who had been involved in authoring the statutory language, was the Chairman of the House Judiciary Committee whose interpretation departed from the Senate Report.<sup>186</sup> Especially since neither the House nor the Senate ever voted upon the Senate Report, nor openly discussed it on the floor, the Report does not clearly represent the views of Republican legislators who were not members of the Senate Judiciary Committee, let alone the Republican members of Congress on the whole. Instead, the bill's unanimous passage in the Senate, its passage with a majority of the Republican representatives in the House, and the rejection of all four House amendments, each with a majority of Republican representatives, signal that the Republican Party intended to adopt the language of the enacted statute that fails to mention

<sup>182</sup> Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988).

<sup>183</sup> See Costello, *supra* note 105, at 62 (defining the median voter or "average Member" as the legislator "who voted on . . . the measure without active involvement in sponsorship, committee consideration, or opposition").

<sup>184</sup> Specifically, Republicans held 231 of 437 House seats and 55 of 100 Senate seats. MILDRED AMER, CONG. RESEARCH SERV., MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE 2 (2006), available at <http://www.senate.gov/reference/resources/pdf/RS22007.pdf>.

<sup>185</sup> See Stern, *supra* note 15 (describing Senator DeWine's refusal to sign the Report). Notably, however, Senator DeWine was the *only* Republican not to sign. *Id.*

<sup>186</sup> See *supra* notes 174-175 and accompanying text.

"naturally occurring" majority-minority districts. Since there is also no evidence that the Senate Report's understanding of Section 5 represents the majority of Congress as a whole,<sup>187</sup> regardless of political party, the Report fails to represent congressional intent under the median voter theory.

### C. Congress Represented by Enacted Statutory Language

Critics of the sponsor and median voter theories of interpreting congressional intent, such as new textualists, fault these theories for departing from and underemphasizing the actual language of the legislation passed by both houses of Congress.<sup>188</sup> Even if the language of the statute is ambiguous, there is no guarantee that bill sponsors, who tend to over-represent interest group understandings, adequately encapsulate congressional intent, or that the median voter theory properly represents what Congress collectively understands the bill to mean.<sup>189</sup> In the case of the VRARA, if Congress as a whole intended to adopt a narrow construction of "ability to elect" so that Section 5 covers only "naturally occurring majority-minority districts," it ought to have included those specific words in Section 5's text to reflect this understanding. This concern is especially valid given that the Senate Report's narrow construction was not unanimously adopted by all Senate Judiciary Committee members, nor was such language reflected in floor debates or the House Report that instead use the statute's broad "ability to elect" language.<sup>190</sup>

On the other hand, since other forms of legislative history do not explicitly provide an alternate understanding of Section 5 retrogression, the Senate Judiciary Committee Report may not actually conflict with either the statute's language or these other legislative materials, instead serving

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<sup>187</sup> As with the analysis of the Republican members' interpretation of Section 5, the Senate Report does not appear to represent congressional intent because its narrowing language was never considered or voted upon by either the House or the Senate, nor does such language appear in the final statute.

<sup>188</sup> See *supra* note 109 (setting forth arguments that courts should look only to statutory text, rather than other legislative materials).

<sup>189</sup> See *supra* notes 168-169 and accompanying text (explaining the setbacks of the sponsor theory of congressional intent); see also Costello, *supra* note 105, at 61-63 (criticizing the median voter theory for being a "fiction" that does not actually clarify either the statute or the record, and risks resulting in "staged" colloquies between bill proponents that speak little to Congress's collective intent).

<sup>190</sup> See *supra* Part I.A (describing the broader retrogression standard established by Section 5 absent the Senate Report's narrowing construction); *supra* note 174 and accompanying text (providing examples of Congress describing "ability to elect" without any narrowing definition).

merely to clarify the administrable standard for "ability to elect." Even absent direct conflict, the language of Section 5 still fails to explicitly articulate such a narrow construction, meaning that the Report cannot be considered under the new textualists' statute-only model of congressional intent, nor is there any guarantee that the Senate Report accurately reflects the understanding of Congress as a whole.

### CONCLUSION

The Senate Judiciary Committee issued a postpassage report that risks narrowing Section 5's scope and enforcement powers.<sup>191</sup> Both this Report and Senator Kyl's "Additional Views" argue that Section 5's retrogression standard covers only "naturally occurring majority-minority districts,"<sup>192</sup> while Senators Cornyn and Coburn's "Additional Views" aver that the time-pressured and politically charged Congress failed to adequately consider alternatives to the bill.<sup>193</sup> Under existing case law for postenactment statements by individual legislators, courts should not interpret such "Additional Views" to represent the views of the collective Congress that enacted the legislation. Because the Report cannot easily be classified as embodying a timely committee report or postenactment legislation, it is less clear whether its narrow "ability to elect" retrogression standard should nonetheless be considered persuasive legislative history.<sup>194</sup>

Under all three models of determining the statutory intent of Congress as a whole, the Senate Report does not conclusively appear to best represent Congress's understanding of Section 5, especially given that it departs from the House Report and Senate Judiciary Committee Democrats' statutory interpretations.<sup>195</sup> Instead, the Report should not be considered authoritative legislative history that is relevant to determining Section 5's scope.

Whether the Report will actually be considered in forthcoming cases challenging the constitutionality of the reauthorized Section 5 is another, more difficult question. Not only have courts—and even the Supreme Court itself—been unable to apply the doctrine of statutory construc-

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<sup>191</sup> See *supra* Part I.D.

<sup>192</sup> S. REP. NO. 109-295, at 24 (2006) (Conf. Rep.).

<sup>193</sup> *Id.* at 30-35.

<sup>194</sup> See *supra* Part III.

<sup>195</sup> See *supra* Part IV.

tion consistently,<sup>196</sup> but the recent additions of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court bench make such predictions even more difficult.<sup>197</sup> However, one theme that appears to run throughout the Court's previous legislative history case law is a bootstrapping concern that makes the Court reluctant to accord weight to any legislative material that appears to impose isolated legislators' statutory interpretation over Congress's collective understanding.<sup>198</sup> The Senate Report met with vehement dissent, was not signed by a majority of the Senate Judiciary Committee, was issued post-passage, and provides a narrow Section 5 understanding that is not reflected anywhere else in the record or the actual legislative text. If the Supreme Court continues to abide by its bootstrapping concern, it is unlikely to accord the Senate Judiciary Committee Report any authoritative weight; nor should it.

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<sup>196</sup> Although Justices Scalia, Thomas, and sometimes Justice Kennedy espouse new textualism, *see supra* note 111, the Supreme Court continues to rely on legislative history to confirm its statutory interpretations. Wald, *supra* note 103, at 286-300. In fact, the number of legislative history references has increased since Justice Breyer joined the Court. *See* Schacter, *supra* note 112, at 10-36 (documenting an increase in legislative history references beginning in the early 1990s).

<sup>197</sup> A recent case suggests that Justice Alito, unlike Justice Scalia, endorses the use of legislative history in statutory interpretation, although it is too soon to tell whether Justice Alito, like Justice Breyer, will consistently rely on legislative history. *See* Posting of Jason Mazzone to Concurring Opinions, <http://www.concurringopinions.com> (June 5, 2006, 16:10 EST) (detailing Justice Alito's reliance on legislative history to interpret the Speedy Trial Act in *Zedner v. United States*, 126 S. Ct. 1976 (2006), and Justice Scalia's concurring opinion criticizing Justice Alito's opinion).

<sup>198</sup> *See supra* note 136 and accompanying text (explaining that courts repeatedly accord little authoritative weight to individual legislators' statutory interpretations).